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No. 04-

IN THE

Supreme Court of the United States

KOYO SEIKO CO., LTD.
AND KOYO CORPORATION OF U.S.A.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the decision below, the Federal Circuit deferred, under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Department of Commerce's conclusion that the Tariff Act of 1930, as amended, permits a practice known as "zeroing" when the agency determines the existence and extent of a foreign company's liability for "dumping"—*i.e.*, the selling of goods into the United States at prices lower than those at which it sells the same goods in its home market. The Federal Circuit deferred to this statutory interpretation notwithstanding that (1) the Tariff Act was amended in 1994 to incorporate language from the Uruguay Round Agreements, a multilateral treaty to which the United States is a signatory; (2) Congress adopted these amendments to ensure that the United States complies with its obligations under that multilateral treaty, and (3) the entity empowered to interpret that multilateral treaty has repeatedly ruled that "zeroing" is *not* permitted by the very treaty language that the 1994 amendments incorporated into the Tariff Act. Accordingly, the questions presented are:

Whether the court of appeals erred in according *Chevron* deference to a Department of Commerce interpretation of the Tariff Act that places the United States in violation of its obligations under a multilateral treaty; and

Whether the court of appeals erred by creating a doctrinal conflict with other circuits that have recognized that, when an agency interprets an ambiguous statute, the *Charming Betsy* canon of statutory construction affords the agency discretion to interpret the statute in a manner consistent with the Nation's international legal obligations, but renders unreasonable, for purposes of *Chevron*, an agency interpretation that places the United States in violation of its international legal obligations.

PARTIES TO THE PROCEEDING

Petitioners are Koyo Seiko Co., Ltd., a Japanese manufacturer of automobile parts and subassemblies, including tapered roller bearings, and its wholly-owned U.S. subsidiary, Koyo Corporation of U.S.A. Petitioners are collectively referred to as "Koyo" in this petition.

Respondent is the United States of America.

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PETITION FOR CERTIORARI

Petitioners Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") respectfully seek a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 354 F.3d 1334 (Fed Cir. 2004) (Pet. App. 1a-18a). The order of the court of appeals denying Koyo's petition for rehearing (Pet. App. 50a-51a) is unreported.

The opinion of the United States Court of International Trade is reported at 240 F. Supp. 2d 1228 (Ct. Int'l Trade 2002) (Pet. App. 19a-49a).

The determination of the U.S. Department of Commerce is reported at 66 Fed. Reg. 15078 (Mar. 15, 2001) ("*Final Results*"), and in the accompanying Issues and Decision Memorandum for the 1998-1999 Administrative Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan (A-588-604/A-588-054); Final Results of Antidumping Duty Administrative Reviews (Mar. 7, 2001) (the "*Final Decision Memorandum*") (relevant portions reproduced in Pet. App. 119a-125a).

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2004. On March 17, 2004, the court of appeals entered an order denying Koyo's timely motion for a rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 731(1), 771(34), 771(35) and 773 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1673(1), 1677(34), 1677(35), 1677b, defining the manner in which dumping margins are to be calculated and antidumping duties to be imposed, are reproduced in Pet. App. 54a-62a.

STATEMENT OF THE CASE

Although this Court's landmark decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), resolved many of the thorny and fundamental issues surrounding judicial review of an agency's interpretation of a statute the agency administers, *Chevron* left in its wake a handful of equally complicated interpretive problems. For example, this Court was required to decide in a clash between *stare decisis* and *Chevron*, which doctrine prevailed. The Court held that *stare decisis* overrode deference to the agency's construction of its own statute. *Neal* v. *United States*, 516 U.S. 284 (1996). The courts of appeals have also wrestled with whether *Chevron* deference takes precedence over the so-called *Blackfeet Tribe* presumption, which governs the interpretation of statutes enacted for the benefit of Indian tribes. See *Navajo Nation* v. *Department of Health & Human Servs.*, 325 F.3d 1133, 1136 n.4 (9th Cir. 2003) (en banc) (noting division among lower courts).

This case poses a conceptually similar problem: when a court reviews an agency interpretation of an ambiguous statute that implicates the Nation's international legal obligations, how, if at all, must the *Chevron* analysis accommodate the time-honored maxim that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In recent years, one federal court has concluded that, for purposes of *Chevron*, the *Charming Betsy* canon

necessarily affords an agency the discretion to implement an ambiguous statute in a manner consistent with the Nation's international legal obligations, even when Congress has not included this principle in a list of statutorily specified factors the agency must consider. Another court recognized the correlative principle that this canon renders unreasonable, under *Chevron*, a statutory interpretation that places the United States in violation of such obligations.

In the decision below, however, the Federal Circuit accorded *Chevron* deference to an agency interpretation that places the United States in violation of its obligations under a multilateral treaty. Indeed, even though the agency was interpreting statutory language that was virtually identical to, and expressly enacted by Congress to implement, language in a multilateral treaty, the lower court ratified an interpretation that has been flatly rejected by the international body responsible for interpreting the cognate provisions of the underlying treaty.

The fact that the agency's interpretation squarely conflicts with the definitive interpretation of identical treaty language, and will thereby cause the United States to violate its obligations under that treaty, is itself sufficient reason to review the decision below. But the lower court's failure properly to apply the *Charming Betsy* doctrine creates a fundamental doctrinal conflict among the lower courts concerning the interplay of this doctrine and *Chevron* review of agency interpretations that directly affect our Nation's international obligations and duties. This issue is extremely important not only in the area of trade regulation, which this case involves, but also in a variety of contexts—such as pollution control, importation of animal products, and removal of aliens—where United States compliance with international agreements is governed by domestic statutes that are interpreted and applied by administrative agencies. Accordingly, this case affords the Court an opportunity to

provide guidance and clarification to lower courts that are increasingly confronting this issue.

A. The Statutory Framework.

"Dumping" involves international price discrimination whereby an exporter sells its merchandise in the country of importation at prices lower than those at which it sells the same goods in its home market.[1] In certain circumstances, the importing country may respond to dumping by imposing "antidumping duties" on the offending imports. In the United States, the antidumping regulatory framework is currently embodied in the Tariff Act of 1930, as amended. The Tariff Act defines "dumping" as "the sale or likely sale of goods at less than fair value," 19 U.S.C. § 1677(34), and provides that, when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and when those sales are found to cause or threaten to cause "material injury" to an industry in the United States, antidumping duties shall be imposed on imports of that foreign merchandise. *Id.* § 1673.

The Department of Commerce (the "Department") is responsible for enforcing the antidumping law. *Id.* § 1677(1). The Tariff Act directs the Department to determine whether foreign merchandise is being sold in the United States at "less than its fair value." *Id.* § 1673(1). To determine this, the Department must compare the prices at which the merchandise is sold in this country (identified as either the "export price" or "constructed export price"[2]) with the

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[1] In his seminal work, Jacob Viner has explained that "[t]he one essential characteristic of dumping, I contend, is price-discrimination between purchasers in different national markets." Jacob Viner, *Dumping: A Problem in International Trade* 4 (August M. Kelley 1966) (1922).

[2] These two terms are defined in 19 U.S.C. § 1677a(a), (b); *cf. AK Steel Corp.* v. *United States*, 226 F.3d 1361, 1367-68 (Fed. Cir. 2000)

"normal value" of the subject merchandise, which is typically measured as the price at which the merchandise is sold in the exporter's or manufacturer's home market. *Id.* § 1677b(a).[3] The difference, or "dumping margin," is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," *id.* §1677(35)(A). The Department then calculates a "weighted average dumping margin," which is defined as:

> the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

Id. § 1677(35)(B).

Congress added an important new feature to the process of determining "dumping margins" in 1994, after the United States became a signatory to the *Uruguay Round Agreements* that established the World Trade Organization ("WTO"), including the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Marrakesh Agreement Establishing the WTO, Annex 1A (Apr. 15, 1994) ("AD Agreement") (relevant portions of which are reproduced in Pet. App. 126a-128a).[4] Article 2.4 of the AD Agreement provides:

> *[a] fair comparison shall be made between the export price and the normal value.* This comparison shall be made at the same level of trade, normally at the ex-

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(describing the two categories of U.S. sales). In this case, all of Koyo's U.S. sales fell within the "constructed export price" category.

[3] In certain situations, "normal value" can instead be determined on the basis of the prices of the exporter's sales of comparable merchandise to third countries, or on the basis of "constructed value," which, roughly, is the cost of manufacture of the merchandise, plus selling and administrative expenses and profit. 19 U.S.C. § 1677b(a)(1)(C), (4).

[4] *Reprinted in* H.R. Doc. No. 103-316, vol. I, at 1453-77 (1994).

> factory level, and in respect of sales made at as nearly as possible the same time.

Pet. App. 126a (emphasis added). And Article 2.4.2 provides, in relevant part, that

> *[s]ubject to the provisions governing fair comparison in paragraph 4*, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all* comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.

Pet. App. 127a-128a (emphases added).

To ensure compliance with these requirements, Congress adopted the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) ("URAA"). As amended by the URAA, the Tariff Act provides that:

> [i]n determining . . . whether subject merchandise is being, or is likely to be, sold at less than fair value, *a fair comparison shall be made between the export price or constructed export price and normal value*.

19 U.S.C. § 1677b(a) (emphasis added). It further provides that, "[i]n order to achieve a fair comparison with the export price or constructed export price," normal value shall be determined as described in the subsequent subsections of the statute. *Id.*

The statutory "fair comparison" requirement incorporates the virtually identical treaty language and requirement into domestic law. Indeed, the Statement of Administrative Action ("SAA") that Congress and the Executive Branch issued in conjunction with the enactment of the URAA expressly notes that the amendments were "intended to bring U.S. law fully into compliance with U.S. obligations under

[the Uruguay Round] agreements."[5] Moreover, with respect to the statutory provisions at issue in this case, the SAA specifically states that the "requirement of Article 2.4 of the Agreement that a fair comparison be made between the export price or constructed export price and normal value is stated in and implemented by section [1677b]."[6]

B. The Department's "Zeroing" Practice And Its Incompatibility With The WTO.

In the administrative proceeding that underlies this litigation, the Department employed a practice known as "zeroing" when calculating Koyo's weighted average dumping margins. For many of Koyo's U.S. transactions in the period covered by this annual review, the legally relevant prices were *higher* than their normal value, which means that those transactions generated "negative" dumping margins. The Department's practice, however, has been to assign to a negative margin the value of zero in calculating the "aggregate dumping margins" that, under 19 U.S.C. § 1677(35)(B), comprise the numerator of the fraction used to calculate a party's "weighted average dumping margin."

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[5] Statement of Administrative Action, in *Message from the President Transmitting the Uruguay Round Trade Agreements*, H.R. Doc. No. 103-316, vol. I, at 669 (1994) (Pet. App. 130a). Congress expressly noted the SAA's significance in interpreting the URAA, in 19 U.S.C. § 3512(d), which states that:

> The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

[6] Pet. App. 131a. *Accord*, S. Rep. No. 103-412, at 67 (1994) ("[a]mended section [1677b(a)] incorporates the requirement of Article 2.4 of the Antidumping Agreement that *a fair comparison be made* between the export price or constructed export price and the normal value") (emphasis added).

A simple example illustrates the practice of zeroing and its effect. Assume that only two U.S. sales of the subject merchandise occurred during the relevant period, one with a U.S. price, after adjustment, of $600, and the other with a U.S. price of $400. Assume further that the normal value in each case is $500. Thus, the first transaction has a dumping margin of -$100, and the second has a dumping margin of $100. Under the Department's zeroing practice, the -$100 would be converted to zero, and the weighted average dumping margin would be calculated as follows:

$$\frac{0 + \$100}{\$600 + \$400} = 10 \text{ percent}$$

If the full effect of the negative dumping margin transaction were considered, however, the weighted average dumping margin would be:

$$\frac{-\$100 + \$100}{\$600 + \$400} = 0 \text{ percent}$$

It has long been recognized that zeroing creates an inherent statistical bias in favor of inflating dumping margins (or even finding the existence of dumping margins where they would not otherwise exist).

> By zeroing negative margins Commerce will find that some dumping occurred if any U.S. sales were made below the average [normal value]. "This will be true even if the vast majority of sales made by the subject foreign producers in the United States were at prices higher than the average [normal value]."

Bowe Passat Reinigungs- und Waschereitechnik GmbH v. *United States*, 20 CIT 558, 570-71, 926 F. Supp. 1138, 1149-50 (1996) (quoting Ronald A. Cass & Stephen J. Narkin, *Antidumping and Countervailing Duty Law: The United States and the GATT, in Down in the Dumps* 200, 205 (Boltuck & Litan eds. 1991)).

Moreover, the practice of zeroing has repeatedly been found to violate the WTO AD Agreement. In the *EC – Bed Linen* dispute, both a dispute settlement panel and the WTO Appellate Body found that the practice, when performed by the European Communities, violated Articles 2.4 and 2.4.2 of the AD Agreement.[7] The Appellate Body stated that:

> a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of "zeroing" in this dispute—is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.

Pet App. 112a (¶ 55).

In *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*,[8] the Appellate Body left no doubt that zeroing is incompatible with the principles underlying the AD Agreement:

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[7] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (circulated Oct. 30, 2000) ("*EC – Bed Linen Panel Report*"); *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (adopted Mar. 1, 2001) ("*EC – Bed Linen Appellate Body Report*") (excerpts attached hereto as Pet. App. 105a-118a). Under the Uruguay Round Agreements, Member States involved in a dispute regarding the obligations created by the Agreements, including the AD Agreement, must first engage in formal "consultations," and then can request that the dispute be handled by a "panel," which is an ad hoc body consisting of three members. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 1654-78 (1994). Appeals from panel decisions are taken to the Appellate Body, a seven-member standing body, three of whom serve in any one case. Only the Dispute Settlement Body, which consists of all the Member States of the WTO, can reject a decision of Appellate Body, and then only by "consensus"—i.e., a unanimous vote.

[8] WT/DS244/AB/R (adopted Jan. 9, 2004) ("*US – Corrosion-Resistant Steel*") (excerpts attached hereto as Pet. App. 98a-104a).

> [w]hen investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margin calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. . . . Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.[9]

The incompatibility of the Department's zeroing practice with the AD Agreement was recently reaffirmed by the panel decision in the *US – Softwood Lumber* dispute, issued on April 13, 2004.[10] Relying on the Appellate Body's determination in *EC – Bed Linen*, the *US – Softwood Lumber* panel found that the Department's zeroing practice is inconsistent with the AD Agreement, explaining that:

> [t]hrough the use of zeroing, it is clear to us that the entirety of the prices of some export transactions, i.e., those export transactions where the weighted-average-export-price is greater than the weighted-average-normal-value, . . . are not taken into account. . . .
>
> . . . [W]e are of the view that the United States did not take into account all comparable export transactions when DOC calculated the overall margin of dumping in the investigation at issue.

Pet. App. 77a-78a (¶¶ 7.216, 7.217).

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[9] Pet. App. 102a-103a (¶ 135). In the *US – Corrosion-Resistant Steel* dispute, although the Appellate Body emphasized the governing principles, it concluded that it could not resolve the particular issue due to inadequacies in the record before it. *Id.* at 103-104a (¶ 137).

[10] *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004) (footnote omitted) ("*US – Softwood Lumber*") (excerpts attached hereto as Pet. App. 63a-97a).

C. Administrative Proceedings Below.

This case arises from the annual review for tapered roller bearings from Japan for the 12-month period October 1, 1998 to September 30, 1999.[11] The statute provides that, in each annual review, the Department must issue both a preliminary and final determination. 19 U.S.C. § 1675(a)(3)(A). In this case, the Department issued its preliminary determination on November 7, 2000, in which it used the "zeroing" practice to calculate Koyo's weighted average dumping margins at 14.86% and 17.94% for the two categories of tapered roller bearings that are subject to the antidumping orders.[12] If the Department had not "zeroed" Koyo's negative margin transactions, Koyo's average dumping margins would have been reduced to zero percent for the first category and under 5% for the second. Thus, by zeroing, the Department created antidumping liability where none otherwise would have existed (for the first category) or substantially inflated that liability (for the second).

After the Department issued the *Preliminary Results*, Koyo informed the Department that the practice of zeroing had been declared inconsistent with the AD Agreement in the *EC – Bed*

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[11] The statute provides that every year, on the anniversary month of an antidumping order, any interested party may request a "periodic" or "annual" review in which the Department is to "review, and determine . . . the amount of [the] antidumping duty." 19 U.S.C. § 1675(a)(1)(B). The results of the annual review determine the exporter's final antidumping duty liability for the entries of merchandise into the United States during the 12-month period governed by the review, and establish an estimated duty rate that is to apply to subsequent entries of the merchandise, until the next requested annual review. *See, e.g., Mitsubishi Elecs. Am., Inc.* v. *United States*, 18 CIT 167, 174, 848 F. Supp. 193, 199, *aff'd*, 44 F.3d 973 (Fed. Cir. 1994).

[12] *Preliminary Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. 66711, 66716 (Nov. 7, 2000) ("*Preliminary Results*").

Linen Panel Report.[13] Accordingly, Koyo argued that the Department should not have zeroed the dumping margins of the negative-margin transactions in calculating Koyo's weighted average dumping margins. In its *Final Results*, the Department rejected that argument and again applied its zeroing practice in calculating Koyo's weighted average dumping margins.[14] In the *Final Decision Memorandum* that accompanied the *Final Results*, the Department explained its reasons for rejecting Koyo's argument:

> [t]hese antidumping administrative reviews are being conducted under the domestic laws of the United States, which laws are fully consistent with international obligations. We note that the calculation methodology addressed by respondents has been upheld repeatedly as consistent with domestic law by reviewing domestic courts. . . . Consequently, the WTO dispute resolution panel reports referred to by respondents, which addressed a matter of WTO jurisprudence, and not domestic U.S. law, is not relevant to this determination. We do note in passing, however, that the report in question addressed EC law and practice and was not a challenge to U.S. law.

Pet. App. 125a (citations omitted). This is the entire basis of the Department's decision on the zeroing issue.

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[13] The WTO Appellate Body subsequently issued its decision affirming the panel report on the zeroing issue on March 1, 2001, *i.e.*, after Koyo filed its case brief with the Department, but before the Department issued its *Final Results*.

[14] The Department issues, with its final results in antidumping proceedings, an unpublished memorandum that explains its decisions on issues raised by the parties. In this case, the Department's discussion of the zeroing issue is found in its *Final Decision Memorandum* (excerpts attached at Pet. App. 119a-125a).

D. Legal Proceedings.

Koyo sought review of the Department's determination in the U.S. Court of International Trade, which has exclusive jurisdiction to hear appeals from decisions of the Department in antidumping annual reviews. 19 U.S.C. § 1516a(a)(2)(A), (B)(iii); 28 U.S.C. § 1581(c). The Court of International Trade upheld the Department's decision in *Timken Co.* v. *United States*, 240 F. Supp. 2d 1228 (Ct. Int'l Trade 2002) (Pet. App. 19a-49a), and the Federal Circuit affirmed that disposition. 354 F.3d 1334 (Fed Cir. 2004) (Pet. App. 1a-18a).

In reviewing the zeroing issue, the Federal Circuit followed *Chevron*'s familiar two-part framework for determining the propriety of an agency's interpretation of a statute it administers. It thus considered whether Congress had spoken directly to the issue through plain and unambiguous statutory language and, if not, whether the Department's interpretation was reasonable. See *Chevron*, 467 U.S. at 842-43. With respect to *Chevron*'s first prong, the Federal Circuit held that the zeroing practice was not compelled by the language of the Tariff Act. The court reasoned that the word "exceeds" in the statutory definition of "dumping," 19 U.S.C. § 1677(35)(A), "does not unambiguously require that dumping margins be positive numbers." Pet. App. 9a.

With respect to *Chevron*'s second prong, the court concluded that the practice of zeroing was "a reasonable interpretation of the statutory language." Pet. App. 10a. The Federal Circuit offered three reasons for rejecting Koyo's argument that zeroing could not be "reasonable" because such an interpretation causes the United States to violate its obligations under the WTO AD Agreement, and thus runs afoul of the settled rule that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

First, the court below opined that the statute specifies how the Department is to calculate the "normal value" that is used in making the required "fair comparison," and that the statute's "exhaustive" list of adjustments effectively precludes creation of any "additional limitations on the calculation of dumping margins." Pet. App. 13a. Second, the court refused to apply the *Charming Betsy* canon on the ground that the *EC – Bed Linen* decision "is not binding on the United States, much less this court," and is insufficiently persuasive to overcome the Department's "longstanding and consistent administrative interpretation." *Id.* at 14a (internal quotation marks omitted). Finally, the court sought to distinguish the *EC – Bed Linen* decision because (1) the former involved the EC, rather than the United States, and (2) the former involved an antidumping investigation rather than an annual review. *Id.* at 14a-15a.

The Federal Circuit denied Koyo's petition for rehearing without opinion. Pet. App. 50a-51a. On April 22, however, it granted Koyo's motion for a recall and stay of the mandate pending the outcome of Koyo's petition to this Court for a writ of certiorari. *Id.* at 52a-53a.

REASONS FOR GRANTING THE PETITION

Through an incorrect application of *Chevron* deference, the lower court affirmed an administrative interpretation that creates a direct conflict between the WTO Appellate Body's interpretation of the "fair comparison" language of the AD Agreement and the very same language in a statute that Congress enacted to ensure that the United States complies with that Agreement. Such a conflict, which places the United States in violation of its multilateral treaty obligations, warrants review by this Court. This is precisely the type of conflict, moreover, that the *Charming Betsy* canon of statutory interpretation is intended to avoid. Accordingly, this Court should grant the petition in order to clarify the interplay of that canon and *Chevron* review of agency interpretations of

statutes that directly affect our international obligations. This important issue has arisen with increasing frequency in the lower courts, and the decision below conflicts with the approaches that other circuits have adopted in a number of contexts where the United States' compliance with international agreements is governed by domestic statutes that are interpreted and applied by administrative agencies. The Court therefore should grant the petition to resolve this conflict and afford much-needed guidance to the lower courts.

I. THE DECISION BELOW IMPROPERLY UPHELD AN AGENCY INTERPRETATION THAT IMPERMISSIBLY CONFLICTS WITH U.S. TREATY OBLIGATIONS.

A. The Department's Interpretation Conflicts With The United States' Treaty Obligations.

The conflict between the Department's zeroing practice and the United States' obligations under the AD Agreement is clear. The United States indisputably bound itself, under that multilateral Agreement, to make a "fair comparison . . . between the export price and normal value" of imported goods when determining antidumping liabilities and duties. Pet. App. 126a (art. 2.4). The international body charged with interpreting the AD Agreement has repeatedly determined that zeroing negative dumping margins does *not* result in the "fair comparison" that the treaty requires. See *supra* pp. 9-10. Yet the Department has adhered to its practice of zeroing such margins. It has done so, moreover, when implementing a statute that incorporated the treaty's "fair comparison" requirement expressly "to bring U.S. law fully into compliance with U.S. obligations under [that] agreement[]." SAA at 669, Pet. App. 130a.

The lower court attempted to brush aside this clear conflict between the agency's actions and U.S. treaty obligations on the ground that the *EC – Bed Linen* decision involved an EC investigation and thus did not bind the United States. As

Koyo pointed out in its petition for rehearing, however, the rationale of the *EC – Bed Linen* decision was recently extended by a WTO panel to the very practice at issue in this case in *US – Softwood Lumber*. Moreover, the Appellate Body has reiterated the same anti-zeroing principles in *US – Corrosion-Resistant Steel*, another recent case involving the United States. See *supra* pp. 9-10. In the face of these repeated rulings, the conflict between the Department's practices and the treaty's requirements is simply beyond dispute.

B. The Conflict Between The Department's Interpretation And The United States' Treaty Obligations Warrants This Court's Review.

The clear conflict between the Department's interpretation of the Tariff Act and the Nation's treaty obligations warrants plenary review and reversal of the decision below. This Court has emphasized that, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995). By failing to exercise such caution here, the lower court upheld an agency interpretation that not only undermines the Nation's "role as a trusted partner in multilateral endeavors," but also exposes the Nation to international sanctions.

The *Charming Betsy* rule is designed to avoid precisely these types of international legal violations and untoward results. Although the court below gave lip service to that rule, see Pet. App. 13a (noting that "trade laws are not exempt from the *Charming Betsy* principle"), it failed to recognize how the rule affects *Chevron* review of agency interpretations that implicate U.S. international obligations. By requiring that statutes be construed, where possible, to avoid violations of "the law of nations" (*i.e.*, U.S. international obligations),

the *Charming Betsy* rule necessarily excludes from the range of otherwise reasonable interpretations those that violate an international obligation of the United States. This principle should have applied with particular force in this case, where the Department was implementing an ambiguous statute that closely tracked the language of a treaty, and that was expressly adopted to ensure compliance with that treaty. Yet the Federal Circuit upheld as reasonable the agency's implementing practice that has repeatedly been found to violate that very treaty.

This Court should not allow the lower court's affirmation of this misguided interpretation of the Tariff Act to stand. Because antidumping determinations can only be reviewed by the Court of International Trade and the Federal Circuit, no other courts of appeal can weigh in on the issue or correct the agency's erroneous interpretation. And, petitioner's attempt to obtain a rehearing proved fruitless even in the face of subsequent WTO rulings that completely undermined the panel's facile distinctions of the *EC – Bed Linen* decision and that confirmed the inescapable conflict between U.S. law, as interpreted by the Department, and U.S. treaty obligations.

The agency below contravened Congress's clear intent to ensure that U.S. trade laws comply with the Nation's obligations under multilateral trade agreements, and the lower court, in turn, failed to apply the principles this Court has announced to ensure that the United States violates such agreements only when Congress clearly intends that result. The economic significance of the resulting treaty violations is enormous. Koyo estimates that, in 2003 alone, the Department used its treaty-violating zeroing practice in 75 antidumping investigations and annual reviews involving over 200 companies from at least 20 countries around the world. The Congressional Budget Office estimates that, in the years 2005-2009, the United States will collect $2.35 billion in dumping and countervailing duties, and $3.85 billion for the period 2005-2014. Congressional Budget Office, *Economic*

Analysis of the Continued Dumping and Subsidy Offset Act of 2000 tbl.1 (Mar. 2, 2004). This Court should grant the petition in order to ensure that the Tariff Act is administered in a manner consistent with the requirements of the Uruguay Round Agreements, as Congress intended.

II. THE DECISION BELOW SOLIDIFIES A SPLIT OF AUTHORITY OVER THE ROLE OF THE *CHARMING BETSY* CANON IN CASES THAT INVOLVE *CHEVRON* REVIEW OF AGENCY INTERPRETATIONS.

The decision below not only creates an unnecessary conflict with U.S. treaty obligations, but it also creates a conflict among the circuits. In contrast to the court below, the Ninth and D.C. Circuits have applied the *Charming Betsy* canon in cases involving review of agency interpretations under *Chevron*'s second prong in a manner that ensures that agency interpretations of statutes do not conflict with the Nation's international legal obligations. Because it can ultimately affect the United States' compliance with a variety of international legal duties, this doctrinal conflict is an exceptionally important one warranting this Court's review.

In stark contrast to the Federal Circuit, the Ninth Circuit recently relied on the *Charming Betsy* canon to reject an agency's interpretation of an ambiguous statute because that interpretation created a conflict with U.S. international obligations. In *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003), the Ninth Circuit ruled that the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 8 U.S.C. § 1231(b)(2), does not authorize the removal of aliens to a country that does not have a government that can "accept" them. After concluding that the language of IIRIRA does not expressly authorize such removals, the Ninth Circuit declined to defer to the government's construction of the statute. Citing the *Charming Betsy* rule, the Ninth Circuit noted that the government did not contest that removal of the petitioning aliens to Somalia would subject them to human rights abuses

"in violation of 'customary international law and provisions of three multilateral treaties to which the United States is a signatory.'" 346 F.3d at 885 (quoting lower court finding). The Ninth Circuit rejected the government's interpretation of the statute that would have permitted such removal, and instead adopted "the construction of the statute that is consistent with international law." *Id.*

The Ninth Circuit thus employed the *Charming Betsy* rule to limit the range of interpretations that can be deemed reasonable, and therefore entitled to deference, under *Chevron*. By doing so, it refused to defer to an agency interpretation that would have placed the United States in violation of its obligations under international law. In the decision below, the Federal Circuit adopted a directly contrary approach: it rejected the argument that the *Charming Betsy* rule can render an agency's interpretation unreasonable under the second prong of the *Chevron* analysis, and it deferred to an agency interpretation that places the United States in violation of its treaty obligations.

The decision below also conflicts with the D.C. Circuit's recognition that the *Charming Betsy* rule makes it reasonable, under *Chevron*, for an agency to consider U.S. compliance with international legal obligations when interpreting a statute even if the statute itself does not identify such compliance as a factor the agency should consider. In *George E. Warren Corp.* v. *U.S. EPA*, 159 F.3d 616, 623-24 (D.C. Cir. 1998), *amended on other grounds by* 164 F.3d 676 (D.C. Cir. 1999), the petitioners argued that a statute's specification of factors the EPA was to consider in promulgating an air quality rule barred the EPA from considering any other factors, including a decision of the WTO Appellate Body that had concluded that EPA's prior air quality rule violated the GATT. The D.C. Circuit disagreed, holding that, under the second prong of *Chevron*, the agency's conclusion that the statute permitted such consideration was permissible. *Id.* at 624. The Court found that the EPA's consideration of factors not enumerated

in the statute, including the WTO Appellate Body decision, was "congruent with . . . the Supreme Court's instruction to avoid an interpretation that would put a law of the United States into conflict with a treaty obligation of the United States." *Id.* (citing *Charming Betsy*). The D.C. Circuit thus recognized that, where Congress has not unambiguously spoken to the precise issue, the *Charming Betsy* rule affords agencies discretion to adopt an interpretation of an ambiguous statute that ensures that the United States does not violate its obligations under international law, and that reviewing courts must defer to such an interpretation as reasonable.

In the decision below, however, the Federal Circuit adopted a directly contrary approach. It viewed the assignment of a value other than zero to negative dumping margins as an adjustment to "normal value," and reasoned that the statute's "exhaustive" list of the adjustments to be applied in calculating "normal value" effectively precludes the creation of any "additional limitations on the calculation of dumping margins." Pet. App. 13a. The result of the Federal Circuit's logic is that the statute's "exhaustive" specification of factors to be considered deprived the Department of discretion to interpret the statute in a manner that does not violate U.S. treaty obligations.[15] It failed to recognize, as the D.C. Circuit has, that a statutory specification of factors an agency must consider cannot, without more, be understood to prevent an agency from ensuring that implementation of that law does

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[15] In fact, the Federal Circuit's logic fails even on its own terms. A decision to zero—or not to zero—negative dumping margins occurs after both "normal value" and the "export price" (or "constructed export price") are determined. Thus, a decision not to zero negative dumping margins does not involve an additional, unspecified adjustment to the statutory calculation of "normal value" at all; instead, it is a decision about how to treat a subset of the dumping margins that result after normal value is established. Moreover, even if the practice of zeroing negative dumping margins could be thought of as a further adjustment to "normal value," the lower court's *expressio unius* theory should have led it to reject that practice, because it is nowhere mentioned in the statute.

not place the United States in violation of its treaty obligations. Because the Federal Circuit's approach inescapably *increases* the likelihood of such violations—both by deferring to interpretations that create such violations and by denying agencies discretion to avoid them—this Court should address this important conflict concerning review of agency interpretations that implicate U.S. international legal obligations.

Finally, it is important to emphasize that the decision below is not an isolated aberration in Federal Circuit caselaw. Both of the errors that infected the decision below are evident in the lower court's prior decision in *Suramerica de Aleaciones Laminadas, C.A.* v. *United States*, 966 F.2d 660 (Fed. Cir. 1992), a case that involved the requirement that any petition that seeks an investigation into the "dumping" of imports be filed "on behalf of an industry." 19 U.S.C. § 1673a(b)(1). After determining that the meaning of this phrase was unclear, the Federal Circuit concluded that the Department was at liberty to adopt an interpretation that conflicted with the GATT. 966 F.2d at 667-68. As it did in the decision below, the Federal Circuit in *Suramerica* failed to recognize that, under the *Charming Betsy* canon, such an interpretation cannot be deemed reasonable.

At the same time, the *Suramerica* decision reflects the Federal Circuit's incongruous view that, even when an agency implements an ambiguous statute—and thus enjoys substantial discretion under *Chevron*—the agency lacks discretion to adopt an interpretation that avoids a violation of U.S. treaty obligations. After acknowledging that Congress intended the statute at issue in *Suramerica* to comply with the GATT, the Federal Circuit stated that "we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did"; "if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy." *Id.* But where, as in *Suramerica* and in this case, statutory provisions

are unclear, there is no basis for concluding that they *require* action inconsistent with the U.S. treaty obligations. The very fact of the statutory ambiguity means that the statutory provisions at issue need not be "inconsistent" with any treaty obligation. The ambiguity empowers the administering agency to interpret such provisions in a manner that is consistent with U.S. international legal obligations, and the *Charming Betsy* rule obligates it, where possible, to do so.[16]

In short, the decision below solidifies a clear conflict among the circuits on an important doctrinal issue that ultimately affects the United States' compliance with its international legal obligations.

III. THE PROPER ROLE OF THE *CHARMING BETSY* CANON IN CASES INVOLVING *CHEVRON* REVIEW OF AGENCY INTERPRETATIONS IS A RECURRING ISSUE.

The doctrinal conflict over the proper application of the *Charming Betsy* canon in cases involving *Chevron* review of agency interpretations is both important and recurring. Not only does the issue have great economic significance in the antidumping arena, but it also arises under a number of other statutes involving such disparate areas as the treatment of

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[16] The Fifth Circuit later relied on *Suramerica* to hold that, in promulgating a regulation governing poultry imports, the Department of Agriculture lacked discretion to ensure that U.S. domestic law did not contravene U.S. obligations under the GATT. *Mississippi Poultry Ass'n* v. *Madigan*, 992 F.2d 1359 (5th Cir.), *amended on other grounds by* 9 F.3d 1113 (5th Cir. 1993). Quoting the same language set forth in the text above, the Fifth Circuit concluded that the Federal Circuit's "flawless reasoning . . . mandates that we give effect to Congress' intent, even if implementation of that intent is virtually certain to create a violation of the GATT." *Id.* at 1366. Because it involved step one of the *Chevron* analysis, *Madigan* does not directly conflict with the decisions of the Ninth and D.C. Circuits discussed above. Nevertheless, *Madigan* underscores the need for clarification concerning the interplay of the *Charming Betsy* canon and *Chevron* review generally, as well as the potential influence of the Federal Circuit's erroneous decision below.

aliens and transnational pollution control. As global interdependence grows, courts will increasingly grapple with review of agency interpretations that implicate the United States' international obligations in these and other important areas. Accordingly, this Court should the grant the petition to provide much needed guidance on this important and recurring issue of federal law.

As noted above, the proper role of the *Charming Betsy* rule in *Chevron* analysis has great economic significance in the antidumping arena, both because the Department applies its treaty-violating zeroing practice in every one of the large number of antidumping investigations and annual reviews it conducts each year, and because of the significant amount of antidumping duties collected—which, to the best of Koyo's reckoning, are substantially inflated by that practice. The issue also arises in the interpretation of other trade regulatory statutes as well. For example, the domestic countervailing duty law is also governed by one of the Uruguay Round Agreements.[17] Administrative enforcement and implementation of that law inevitably implicate the United States' compliance with the Agreement, and federal courts have repeatedly been called upon to evaluate the propriety, under *Chevron*, of these implementation decisions.

Nor is international trade the only area in which courts must address this issue. The interplay of the *Charming Betsy* rule and *Chevron* analysis has already arisen in connection with statutes governing the removal of aliens from the United States, *Ali*, 346 F.3d at 885, the importation of poultry products into this country, *Madigan*, 992 F.2d at 1366, and the promulgation of regulations governing the air quality in the United States, *George E. Warren Corp.*, 159 F.3d at 624. This list, moreover, is by no means an exhaustive one. As Justice Breyer recently noted:

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[17] *Agreement on Subsidies and Countervailing Measures, reprinted in* H.R. Doc. No. 103-316, vol. I, at 1533-76 (1994).

> we face an increasing number of domestic legal questions that directly implicate foreign or international law. . . . The growing number of such statutes [*i.e.*, for which reference to foreign legal sources is an appropriate source of interpretive guidance] reflects the commercial, technological, and political changes that we often use the cliché "globalization" to describe.[18]

And, as Justice O'Connor has explained, "[w]e operate today under a large array of international agreements and organizations directly impacting judicial decisionmaking, including . . . the World Trade Organization."[19]

Indeed, the increasing recognition that many complex problems require transnational regulatory solutions has led the United States in recent years to sign on to a number of international agreements, and to enact implementing legislation that is interpreted and enforced by administrative agencies. Given the burgeoning number of such laws and the importance of ensuring that the United States is able to "gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors," *Vimar*, 515 U.S. at 539, this Court should grant the petition, resolve the circuit split, and provide the lower courts with the guidance they need to address this recurring and fundamental issue of administrative law.

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[18] Justice Stephen Breyer, The Supreme Court and the New International Law, Address at the American Society of International Law, 97th Annual Meeting (Apr. 4, 2003), *at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

[19] Justice Sandra Day O'Connor, Remarks at Award Presentation by the Southern Center for International Studies 1 (Oct. 28, 2003), *at* http://www.southerncenter.org/OConnor_transcript.pdf .

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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